

No. 45190-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cory Breidt,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-01443-1

The Honorable Judge Marilyn Haan

Appellant's Opening Brief

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ISSUE AND ASSIGNMENTS OF ERROR

1. As applied to Mr. Breidt, the sex offender registration statute is unconstitutionally vague.
2. RCW 9A.44.130 is unconstitutionally vague because it fails to adequately define the term “residence” or the phrase “residence address.”
3. RCW 9A.44.130 is unconstitutionally vague because it fails to adequately define what is meant by a “change” of residence address.

ISSUE: A criminal statute is unconstitutionally vague if it fails to provide (1) adequate notice of what is forbidden and (2) objective guidelines to guard against arbitrary application. RCW 9A.44.130 does not define the term “residence” or the phrase “residence address,” and does not explain what is meant by a “change” of residence address. Is the statute unconstitutionally vague as applied to Mr. Breidt, who was temporarily absent from his apartment for a period of less than a week, who had permission from his landlord to remain in the apartment despite difficulty paying his rent, who left clothing and other property in the apartment during his temporary absence, and who showed no intention of abandoning the apartment?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Cory Breidt lived with his long-time friend Porfitio Chavez in Kelso. RP 10-11. Mr. Breidt registered his address, as he is required to do, with the Cowlitz County Sheriff's Department. RP 21, 25-28. Mr. Breidt did not have his own room at his friend's house, he slept on the couch. RP 11. He got his mail there, took his meals there, and stored his personal belongings there. RP 11-12.

Detective Fletcher went to the house on November 27, 2012, to verify Mr. Breidt's residence. RP 32. Chavez told him that Mr. Breidt had moved out. RP 14, 32. The stated filed a failure to register charge. CP 1-2.

At trial, Chavez said that he had asked Mr. Breidt to move out by November 1, 2012. RP 12, 16. He testified that after that, Mr. Breidt's mail still came to the house, and that he gave it to him when he saw him. RP 16-18. He acknowledged that Mr. Breidt still took meals there, and still had personal items there. RP 13, 17.

In fact, he said, Mr. Breidt was there daily. When he was asked if Mr. Breidt slept over at the house after November 1, Chavez said that he could not say that he did not. RP 14, 17.

The jury convicted Mr. Breidt and he received a 24 month sentence. He timely appealed. CP 4-17, 18-32.

ARGUMENT

I. RCW 9A.44.130 IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MR. BREIDT.

A. Standard of Review

The constitutionality of a statute is reviewed *de novo*. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

B. The statute criminalizing failure to register as a sex offender is unconstitutionally vague because it does not adequately define what it means to “change” one’s “residence.”

Due process requires that citizens be given fair warning regarding criminalized conduct. *State v. Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. A statute fails to provide constitutionally adequate notice if it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909 (2007)

(quoting *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed 322 (1926)).

A statute can be unconstitutionally vague in two ways. First, it may provide inadequate notice, so that ordinary people cannot understand what conduct it prohibits. Second, it may authorize arbitrary or discriminatory application by law enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); *State v. Williams*, 144 Wn.2d 197, 203-04, 26 P.3d 890 (2001). A statute is unconstitutionally vague if either element is satisfied. *Id.*

Statutes that use inherently subjective terms such as “loiter,” “wander,” “lawful excuse,” or “pornography” violate due process. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000); *State v. Sansone*, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005).¹ Such statutes “trap the innocent by not providing fair warning” or “delegate basic policy matters to policemen, judges, and juries for a resolution on an ad hoc and subjective basis.” *Lorang*, 140 Wn.2d at 30-31 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)).

¹ *Valencia* and *Sansone* addressed the vagueness of conditions of community placement rather than the constitutionality of statutes. *Valencia*, 169 Wn.2d at 791; *Sansone*, 127 Wn. App. at 638. Although sentencing conditions are not given the presumption of constitutionality that applies to legislative enactments, the analysis undertaken in *Valencia* and *Sansone* is analogous to the analysis of vague statutory terms here.

A vagueness challenge requires analysis of the statute as applied to the facts of the case.² *State v. Jenkins*, 100 Wn. App. 85, 89, 995 P.2d 1268 (2000).

RCW 9A.44.130(4)(a) requires any person obligated to register to provide written notice to the county sheriff within three business days of changing his or her “residence address.” Neither that provision nor any other part of chapter RCW 9A.44 defines “residence” or “residence address.” Nor has the legislature explained what constitutes a “change” of one’s “residence address.” *See* RCW 9A.44 *generally*.

By contrast, the phrase “fixed residence” *is* defined by statute;³ however, the section under which Mr. Breidt was charged refers to a person’s “residence address,” while other parts of RCW 9A.44.130 reference the phrase “fixed residence.” *Compare* RCW 9A.44.130(4)(a) *with* RCW 9A.44.130(1)(a), (2)(a), (3)(a)(vii), (3)(a)(viii), (5)(a)-(c). Because the legislature used the phrase “fixed residence” in some provisions and the phrase “residence address” in others, the two phrases are deemed to have different meanings. *State v. Roggenkamp*, 153 Wn.2d

² A claim that a statute is unconstitutionally vague on its face is only permitted if the statute implicates the First Amendment. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

³ *See* RCW 9A.44.128. The definition is apparently meant to distinguish between those who are homeless and those who are not.

614, 625, 106 P.3d 196 (2005). Furthermore, under the maxim *expressio unius est exclusio alterius*,⁴ the omission of the phrase “fixed residence” from RCW 9A.44.130(4)(a) is presumed to be intentional.

The term “residence” (or “residence address”) may be defined in several different ways. In addition to the statutory definition of “fixed residence” found in RCW 9A.44.128, courts have applied a variety of factors to determine whether or not a particular dwelling qualifies as a residence. *See e.g. State v. Drake*, 149 Wn. App. 88, 94-95, 201 P.3d 1093 (2009) (finding that the inquiry turned on whether the person intends to return to a dwelling place); *State v. Stratton*, 130 Wn. App. 760, 765, 124 P.3d 660 (2005) (providing several dictionary definitions for the term); *State v. Willingham*, 169 Wn.2d 193, 195, 234 P.3d 211 (2010) (finding that one’s “residence” is not necessarily changed by a two-week absence from the state); *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999) (“Residence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.”)

⁴ “The expression of one thing is the exclusion of another.” *Black’s Law Dictionary* (6th ed. 1990). *See, e.g., In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008).

Likewise, the phrase “change[] his or her residence address” is vague. RCW 9A.44.130(4)(a). A change of residence address could occur when a person ceases to pay rent, receives a notice of eviction, moves belongings to another location, sleeps some predetermined number of nights at another location, changes her/his mailing address, or leaves without intending to return to the original address. *See, e.g., Drake*, 149 Wn. App. at 94-95 (finding that the accused had not changed his residence address when he began living in his car in the driveway.).

Division II found a prior version of RCW 9A.44.130 to be unconstitutionally vague. *Jenkins*, 100 Wn. App. at 91. The *Jenkins* court held that the phrase “changes his or her residence address” did not provide adequate notice because “person of common intelligence must necessarily guess” as to its meaning. *Jenkins*, 100 Wn. App. at 91.

The facts of this case illustrate the vagueness problems from which the statute suffers. Some of Mr. Breidt’s belongings remained at Chavez’s house, his mail still went there, he took meals there, spent time there, and likely slept there as well. RP 13-14, 16-18.

Given these circumstances, it is not clear that Chavez’s conclusion that Mr. Breidt no longer “lived” there was founded. It is likely that Mr. Breidt did not believe he’d changed his residence address. The

registration statute provided him with no guidance in determining whether he had done so. RCW 9A.44.130.

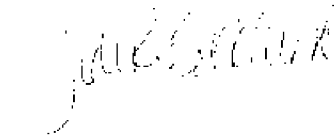
RCW 9A.44.130 is unconstitutionally vague as applied to this case. Accordingly, Mr. Breidt's conviction must be reversed. *Jenkins*, 100 Wn. App. at 93.

CONCLUSION

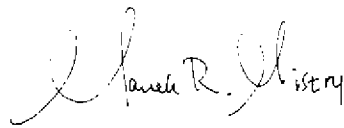
For the reasons argued above, Mr. Breidt's conviction must be reversed.

Respectfully submitted on January 13, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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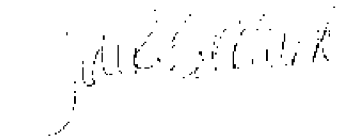
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 13, 2014.



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